A

Benalec Marine Sdn Bhd v Liziz Standaco Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02–1437–06 OF 2013
ZAWAWI SALLEH, BADARIAH SAHAMID AND MARY LIM JJCA
13 MAY 2016

C *Contract — Breach — Repudiation — Respondent hired appellant to carry out works but failed to fulfill various obligations under contract — Whether obligations were fundamental terms breach of which entitled appellant to treat itself as discharged from its obligations under contract — Whether respondent's repudiatory breaches entitled appellant to terminate contract and abandon the works*

D

The respondent, which appointed the appellant to carry out sand dredging works in a project, sued the appellant in the High Court for abandoning the contract and leaving the works uncompleted. The respondent claimed RM8,580,000 as costs it claimed it incurred to complete the works, to dismantle a temporary jetty that had been erected by the appellant and to clear the project site of sand that had been left dredged up by the appellant. The respondent also claimed a refund of RM851,412.30 for diesel fuel it had supplied the appellant. In its defence, the appellant denied breaching the contract and claimed that it was actually the respondent which had committed various repudiatory breaches entitling the appellant to accept the repudiation and terminate the contract. The appellant counterclaimed for RM3,429,357.30 against the respondent. After a full trial, the High Court found the appellant had breached the contract when it abandoned the works without completion and that the respondent had not committed any breach or repudiatory breach that entitled the appellant to terminate the contract. The court allowed the respondent's claim with damages to be assessed and dismissed the counterclaim resulting in the instant appeal against that decision. In the appeal, the appellant contended that the trial judge erred in failing to consider the various repudiatory breaches of the respondent which the appellant set out in a letter to the respondent notifying the latter that it intended to terminate the contract.

I **Held,** allowing the appeal, dismissing the respondent's claim in the court below and allowing the appellant's counterclaim in the sum of RM1,334,141:

(1) The obligation to pay monthly progress claims and such other payments as agreed was an important, significant and fundamental term of the contract. The respondent was obliged to pay the appellant and the

evidence clearly showed the respondent did not do so. The respondent's failure to pay what was already due was an important element on the question of repudiation of the contract. The failure to make timely payments could and did have serious and disastrous effect on the performance of the contract by the subcontractors and, consequently, the appellant. This failure was a breach of the contract by the respondent which entitled the appellant to terminate the contract. Unfortunately, this was not properly appreciated by the trial judge rendering it necessary in the circumstances for this court to intervene to put right what was plainly wrong (see paras 42–43).

(2) The respondent's defence to the appellant's counterclaim was essentially one of denial. This court found that the appellant was entitled, after the necessary deductions were made, to a total of RM1,334,141 on its counterclaim. This figure was made up of RM816,221 for progress claims for work done to date, RM47,140 as idling costs due to stoppage of works caused by a two-day diesel shortage at RM23,570 per day, and RM470,780 in respect of other idling costs claimed (see paras 45–49 & 51).

[Bahasa Malaysia summary

Responden, yang melantik perayu untuk menjalankan kerja-kerja mengorek pasir di dalam projek, menyaman perayu di Mahkamah Tinggi kerana menghentikan kontrak dan meninggalkan kerja-kerja yang tidak siap. Responden menuntut RM8,580,000 sebagai kos yang ia dakwa ditanggungnya untuk menyelesaikan kerja-kerja, untuk membuka jeti sementara yang telah dibina oleh perayu dan untuk membersihkan tapak projek daripada pasir yang telah dikorek oleh perayu. Responden juga menuntut bayaran balik sebanyak RM851,412.30 bagi minyak disel yang ia bekalkan kepada perayu. Dalam pembelaannya, perayu menafikan memungkiri kontrak dan mendakwa sebenarnya ia adalah responden yang telah melakukan pelbagai kemungkiran penolakan yang memberikan hak kepada perayu untuk menerima penolakan tersebut dan menamatkan kontrak tersebut. Mahkamah membenarkan tuntutan responden dengan ganti rugi ditaksirkan dan menolak tuntutan balas mengakibatkan rayuan ini terhadap keputusan tersebut. Dalam rayuan, perayu berhujah bahawa hakim perbicaraan tersilap kerana gagal untuk mempertimbangkan pelbagai kemungkiran penolakan responden yang mana perayu telah menyatakan di dalam surat kepada responden dengan memberitahu responden bahawa ia berniat untuk menamatkan kontrak tersebut.

Diputuskan, membenarkan rayuan, menolak tuntutan responden di Mahkamah Tinggi dan membenarkan tuntutan balas perayu dalam jumlah RM1,334,141:

(1) Tanggungjawab untuk membayar tuntutan kemajuan bulanan dan

bayaran-bayaran lain seperti yang dipersetujui adalah penting, bermakna dan terma asas kontrak tersebut. Responden adalah bertanggungjawab untuk membayar perayu dan keterangan jelas menunjukkan responden tidak berbuat sedemikian. Kegagalan responden untuk membayar apa yang kena dibayar adalah unsur penting atas soalan penolakan kontrak. Kegagalan untuk membuat bayaran pada tepat masa boleh dan mempunyai kesan serius dan teruk ke atas pelaksanaan kontrak oleh subkontraktor dan, akhirnya, perayu. Kegagalan ini adalah kemungkiran kontrak oleh responden yang mana memberi hak kepada perayu untuk menamatkan kontrak. Malangnya, ini tidak dipertimbangkan oleh hakim perbicaraan membuatkannya perlu dalam keadaan untuk mahkamah ini campur tangan bagi memperbetulkan apa yang jelas salah (lihat perenggan 42–43).

(2) Pembelaan responden kepada tuntutan balas perayu adalah pada dasarnya satu penafian. Mahkamah ini mendapati bahawa perayu berhak, selepas pemotongan penting dibuat, kepada jumlah sebanyak RM1,334,141 atas tuntutan balasnya. Jumlah ini adalah terdiri daripada RM816,221 bagi tuntutan kemajuan untuk kerja dilakukan setakat ini, RM47,140 sebagai kos masa terbiar akibat pemberhentian kerja-kerja yang disebabkan oleh kekurangan disel selama dua hari pada RM23,570 sehari, dan RM470,780 berkaitan kos masa terbiar lain yang dituntut (lihat perenggan 45–49 & 51).]

Notes

For cases on repudiation, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3739–3754.

Cases referred to

Ban Hong Joo Mines Ltd v Chen & Yap Ltd [1969] 2 MLJ 83, FC (refd)
Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675, CA (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Appeal from: Civil Suit No 22–137 of 2007 (High Court, Kota Bharu)

Michael Teo (Lim Fung Yun with him) (Lim Fung Yin & Co) for the appellant.
Trevor George De Silva (Benedict Cheang and Yeow Tze Yi with him) (Benedict Cheng Naziruddin & Co) for the respondent.

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant who was the defendant in the court below was sued by the respondent on the ground that the appellant was in breach of contract when it failed to complete the contracted works. The appellant denied that it was in breach, claiming that it was actually the respondent who had committed various repudiatory breaches which entitled the appellant to accept the repudiation and terminate the contract. The appellant counterclaimed for its loss and damage.

[2] After a full trial, the High Court agreed with the respondent and allowed its claim. The counterclaim was consequently dismissed. Being dissatisfied, the appellant appealed to this court.

BACKGROUND FACTS

[3] By letter of award dated 14 November 2006, the appellant ('the contractor') was appointed by the respondent ('the owner'), to carry out river sand dredging works as part of the respondent's joint venture project with the Government of the State of Kelantan ('the contract'). That project, known as 'Proposed KB Water Front City Project' involved the 'reclamation' of several banks of the Sungai Kelantan.

[4] Under the letter of award, the appellant was required to dredge and pump out sand from designated areas along Sungai Kelantan and to transport the dredged river sand to designated fill areas. The details of the scope of work and the designated areas are found respectively in Appendices A and B which are attached to the letter of award. Appendix B comprised three maps. Part of the appellant's scope of work required the appellant to provide a dredging fleet consisting of cutter suction, clamshell dredger, sand pump, barge, tugboat and any other related machineries and personnel as may be deemed fit and proper by the appellant for carrying out dredging and pumping out of sand.

[5] The contract was for the provisional sum of RM30,300,000. The respondent also agreed to pay the appellant an advance payment of RM1m. This sum was to be paid in two stages of RM500,000 each: the first upon acceptance of the letter of award; the second upon mobilisation of cutter section dredger and clamshell dredger to the site.

[6] The parties agreed that payment for work done would be by way of monthly progressive claims based on interim joint surveys where half of the monthly progress claims would be paid within 30 days of receipt of the claims.

It was further agreed that the respondent would pay for the cost of monthly diesel fuel consumed during the course of the works as well as the monthly wages of the appellant's personnel and crew. Such payments, however, were to be treated as advances that the respondent could later deduct from the monthly progress claims subject to the agreed rates as found in cl 3.4.

[7] In addition to the above, the respondent agreed 'to create third party charges in respect of sufficient plot of land held under land title No PT 1217 to PT 1451 in favour of any financial institution ... and do all other things necessary in connection thereof in order for the Contractor to secure credit facilities sufficient to finance the balance 50% of the monthly progress payment'.

[8] The works were scheduled to be completed within 15 months, that is, by 14 March 2008. This date of completion was extended to 13 April 2008 upon the appellant's request vide letter dated 18 January 2007 due to 'exceptionally inclement weather'.

[9] The works were never completed by the appellant. Instead, by letter dated 4 July 2007, the appellant notified the respondent that it was terminating the contract by reason of the respondent's repudiatory breach of contract which entitled the appellant to terminate the contract. The appellant left the contract works and on 13 September 2007, submitted its 'Final Statement of Account' seeking payment of RM3,429,357.30.

THE COMPETING CLAIMS

[10] On 14 November 2007, the respondent sued the appellant. The claim was that the appellant was in breach of contract when it did not complete the contract works. The respondent claimed a sum of RM8,580,000 as the costs for completing the contract works, costs of dismantling the temporary jetty erected by the appellant, and costs of transferring the stockpiles of sand dredged up by the appellant elsewhere as these stockpiles had affected access to the project site. The respondent further claimed a refund of RM851,412.30 for diesel fuel which it had supplied the appellant.

[11] In defence, the appellant reiterated its contention that the respondent was in repudiatory breach and that it had accepted the repudiation and validly terminated the contract. The appellant counterclaimed the sum of RM3,429,357.30 as set out in its final statement of accounts.

[12] The counterclaim was denied by the respondent who reasserted that it was the appellant who was in breach of contract and that the appellant's termination was without reasonable cause.

DECISION OF THE HIGH COURT

[13] In view of the competing claims, the learned trial judge opined that the claims ought to be determined in the following order:

(a) whether the appellant was in breach of contract when it left the project site and failed to complete the contract works;

(b) whether the respondent was in repudiatory breach;

(c) whether the respondent had proved its claim; and

(d) whether the appellant had proved its counterclaim.

[14] The first two issues were taken together. His Lordship examined the evidence in relation to the allegations of breach by both sides before concluding that it was the appellant who was in breach of contract when it abandoned works without completing the contract works. The trial court found that the respondent had not committed any breach of contract including any repudiatory breach which entitled the appellant to a termination of the contract. Lastly, the trial judge found the respondent's claim proved on a balance of probabilities and proceeded to allow the claim with damages to be assessed while the counterclaim was dismissed.

SUBMISSIONS OF THE APPELLANT

[15] Before us, learned counsel for the appellant submitted that the trial judge was erroneous in his findings and conclusions, especially in holding that the respondent had not committed any repudiatory breaches of contract. Accepting that it did not complete the works, the appellant contended that it nevertheless had good reasons for not completing the works.

[16] In its letter notifying the respondent of its intention to terminate the contract, the appellant had cited the following grounds:

(a) breach of cl 8.4 of the letter of award in not paying monthly progress claims of the sand discharging subcontractor and the monthly wages of the staff, personnel and crew;

(b) breach of cl 8.4 of the letter of award in not paying the appellant's monthly progress claims;

(c) breach of cl 2.3 of the letter of award in not providing or disclosing the relevant sand permits/licenses from the relevant authorities including the conditions of approval from the relevant authorities such as JPS, DOE and Jabatan Laut; this constitute acts of prevention the consequence of which the appellant was unable to proceed regularly and diligently with the contract works;

(d) breach of cll 8.5 and 8.6 of the letter of award in not finalising the details of the formal agreement for the payment of the balance 50% of the monthly progress claims from credit facilities to be secured with UOB Bank, which agreement was said to be 'crucial' to the appellant 'securing credit facilities' from UOB Bank;

(e) failing, neglecting and refusing to provide a company profile for the processing of credit facilities; and

(f) 'And other various breaches/defaults/repudiation of contract which we shall address in the proper forum'.

[17] In this appeal, counsel for the appellant submitted that the learned trial judge did not deal with all of these grounds. Certainly, the court did not deal with the matter of the respondent's breach of cl 8.4. Had the court done so, the appellant maintained that the court would have come to the conclusion that the respondent was in breach, and such breach gave the appellant the right to terminate the contract.

[18] In relation to cl 8.4, the argument is as follows. Under the terms of the contract, the respondent was to pay the following costs to the appellant:

(a) the monthly cost of the diesel fuel utilised or consumed in carrying out the works;

(b) the monthly cost of the wages of the appellant's personnel and crew involved in carrying out the works; and

(c) the monthly claims of the sand discharging subcontractor.

[19] These costs were to be treated as advances from the respondent to the appellant and these advances were to be deducted from the appellant's monthly progress payments. As for the appellant's monthly progress claims, the parties had agreed that payment for these monthly progressive claims would be based on interim joint surveys where half of the monthly progress claims would be paid within 30 days of receipt of the claims.

[20] The appellant contended that it had made three interim progress claims for work done till end of April totaling the sum of RM1,614,394.10 — see p 454. The appellant had also submitted claims on the costs of diesel etc totaling RM759,663.98. After deducting these costs and also a proportionate deduction of the RM1m advance, the amount outstanding from the respondent as at 31 May 2007 was a sum of RM692,997.32. The respondent did not pay.

[21] The appellant next claimed that as a result of the respondent's non-payment of the monthly progress claims, the appellant incurred idling costs. These idling costs arose in several ways.

[22] First, there was a shortage of diesel fuel which caused the works to stop. Idling charges were incurred totaling RM23,570. Second, the sand discharging contractor, Good Time Plastics Trading stopped work because of non-payment. This had a domino effect on the appellant who, too, was unable to work and idling charges of RM21,170 per day were incurred. According to the appellant, this non-payment caused 'all vessels and machineries for dredging and lorry discharging works idled at site'. The appellant informed the respondent that it would back charge idling costs then 'totaling a sum of RM21,170.00 from 30th May 2007 (date of aforesaid stop work) up to the day we resume work upon receiving the outstanding payment of RM692,997.32'.

[23] The appellant's argument is that this failure to pay the appellant's monthly progress claim amounts to a breach on the part of the respondent. This breach gave the appellant the right to terminate the contract. The appellant was therefore acting within its rights when it stopped works and vacated the project site.

[24] The next purported repudiatory breach concerns the non-provision or non-disclosure of sand permits or licences issued by the relevant authorities including the conditions of approval from authorities such as JPS, DOE and Jabatan Laut. SD1, Swee Ching Lai who was the appellant's project manager testified that the appellant was reluctant to dredge for fear of trespassing or action by the relevant authorities for unlawful dredging of sand, or trespassing. The permits and/or licences were to allay those concerns so that the appellant could proceed diligently and regularly with the contract works.

[25] Finally, is the allegation of a breach of cl 8.6 of the letter of award. The respondent is said to have failed to cooperate and assist the appellant in securing credit or financing facilities for 50% of the progress claims. According to SD2, the appellant had approached four banks for credit facilities required to finance the 50% of the progress claims as the respondent was only going to pay the appellant 50% of its claims each month. It was unsuccessful with three of the banks. The appellant claimed that it was the fourth bank, UOB Bank who wanted 'ALL the land titles' in order to do land searches. The appellant was really acting as a 'post office', conveying the bank's requests from time to time. The appellant's complaint is that the respondent was not forthcoming with the information and requests. The respondent only provided one out of 235 titles.

A SUBMISSIONS OF THE RESPONDENT

[26] On the first ground of complaint, the respondent countered that it had in effect overpaid the appellant by a sum of RM1,124,934.95 when the payment terms in the letter of award are examined — see pp 459–460. The respondent argued that it was clear from the terms of the letter of award that contrary to the appellant's interpretation of 15 proportionate deductions over the period of the contract, the respondent was in fact, entitled to deduct the full sum of advance of RM1m from the progress claims through the two deductions that it made. With such clear unambiguous terms, there was no room for any implied reading as espoused in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719. In any case, the appellant's construction arose only after the letter of award had been executed and the works commenced.

[27] As for the other allegations, the matter of the title deeds were not raised until the appellant's performance and output of the dredging were far behind schedule. Further, the issue about securing financing was non-conclusive as the appellant was unable to secure approval for the facilities.

[28] On the matter of the licence, the allegations of villages threatening and authorities complaining about trespass never materialised at all. The respondent's managing director, Guok Ngong Peng ('SP2') testified that he had at the material time, explained to the appellant's representative, Vincent Leow that no permits were required as the contract works were part of the respondent's project known as 'Water Front City'. This project was a joint venture with the Government of the State of Kelantan where several banks of the Sungai Kelantan had to be 'reclaimed'. The state government had given the respondent consent to dredge sand and to fill the dredged up sand in other parts of the project site. SP2 had also shown the relevant documents to SD3 at the material time.

[29] Given that the appellant's arguments were without basis, and that allegations of breaches were never raised or relied on by the appellant until after the appellant had ceased work, the respondent contended that the appellant was really 'looking for a way out of the Contract for reason(s) best known to them'. Hence, the learned judge was correct in law in finding that the respondent was not in breach or material breach as to justify the appellant to stop work and subsequently terminate the contract. In fact, it was the appellant who was in breach when it stopped works and left the project site.

THIS APPEAL

[30] As we understand from the competing submissions of the parties, the matter of the appellant's progress claims and all other financial arrangements regarding diesel fuel, labour and subcontractor's costs is a critical if not central issue in this claim. It is undeniable that the appellant's case is that it stopped work because it was not paid. Not only was the appellant not paid, its subcontractor who was supposed to be paid directly by the respondent was also not paid. At the same time, the respondent is said to have not paid for the diesel fuel costs or supplied the diesel fuel. When this happened, work stopped and idling costs were incurred. The counterclaim is for the progress claims and for idling costs.

[31] This ground of termination was addressed by the trial judge under the subject of payment for diesel fuel and payment of advance. At paras 12–13 of the judgment, the trial judge summed up the respondent's case as this — that SP2 had testified that in accordance with the contract, the plaintiff had made two advances of RM500,000 each in November 2006 and March 2007. This was to enable the appellant to pay for the diesel and to pay for the wages of the workers in accordance with cll 8.1 and 8.4 of the contract. These advances were to be repaid in 15 equal monthly instalments of RM33,333.33 each. SP2 claimed that aside from making these advances, the respondent had also paid for the diesel directly to the suppliers; and had paid to the subcontractors directly.

[32] The appellant's case on the payment terms is this — SD1 testified that the respondent failed to pay for the diesel fuel and failed to provide diesel to the subcontractor. This led to a two-day disruption of supply from 20–22 May 2007 causing the cutter suction to idle thus incurring idling costs of RM23,570 per day. Due to lack of fuel, the appellant also had to pay idling costs for the clamshell for 35 days totaling RM775,950 and for the cutter suction for 27 days totaling RM636,390. As for the subcontractor, the appellant claimed that the subcontractor stopped work when it was not paid by the respondent. The respondent is said to have also failed to reimburse the appellant. A total amount of RM692,997.32 is said to be still due and outstanding.

[33] At para 47 is the trial judge's decision on this issue; and it would appear that the court chose to deal with the issue from the perspective of pleadings. According to the learned trial judge, the appellant is said to have submitted that SP2's evidence that the diesel fuel was included in the RM1m advance ought to be ignored as it was not pleaded. The trial judge found the argument was without merit. The court found that the respondent had pleaded the matter of

the diesel fuel and there was no need to provide factual details of the plea. Other than this, it would appear that there was no other determination of the issue.

[34] On the issue of pleadings, with respect, the learned trial judge was erroneous on the status of the pleadings. The point here really was the issue of overpayment; that with the payment for the diesel and the advance, the appellant had been overpaid and no payment was due. Contrary to the findings of the learned trial judge, this issue was not pleaded, be it in the statement of claim or in the defence to the counterclaim. A plea that there have been payments for diesel fuel and an advance given to the appellant is quite different from a plea that these payments give rise to an overpayment by the respondent; or that no payment is due for progress claims on work done under the contract. The respondent should not have been allowed to deviate from its pleaded case and raise the matter of overpayment.

[35] In any case, on the matter of the monthly progress claims, the parties had agreed that the appellant was to be paid for its work by way of progressive monthly claims based on joint surveys. The respondent did not pay on the monthly progress claims and it issued a letter to the effect that it had overpaid — see letter dated 31 May 2007 at p 459. Hence, the reasons for the non-payment, which is overpayment must be examined. This issue of payment of the monthly progress claims is a material if not central issue to the whole claim. It is important to determine whether the appellant's monthly payments were honoured in the manner as agreed by the parties. Since the allegation of non-payment was made by the appellant, it bears the burden of proof.

[36] The first place to start must be the payment terms in cl 8 of the letter of award. Those terms read as follow:

8. Term of Payment

8.1 Upon the Contractor's acceptance of this Letter of Award, an advance payment of RM500,000.00 shall be paid by the Owner to the Contractor. Upon the mobilization of cutter suction dredger and clamshell dredger to site, another advance payment of RM500,000.00 shall be paid by the Owner to the contractor.

8.2 Thereafter, payment claim for work done shall be on monthly progressive basis based on the interim joint- survey for progress claim above said.

8.3 The Owner shall retain 10% of each monthly progressive claim and up to maximum of 5% of the Provisional Contract Sum and the total retention sum in respect of Phase 1 works shall be released to the Contractor upon completion of the Phase 1 Works.

8.4 The Owner shall pay the cost of monthly diesel fuel consume during the course of the Works and the monthly wages of the Contractor's personnel and crews involved in the Works and also the sub-contractor monthly progress claim on sand discharging. The total sums paid by the Owner shall be treated as an advance from the Owner to the Contractor and shall be deducted from the monthly progress payment SUBJECT ALWAYS to Clause 3.4 above.

8.5 Within thirty (30) days of the Owner's receipt of the monthly progress claim, the Owner shall make payment of 50% of the amount claimed by the Contractor in the monthly progress claims SUBJECT ALWAYS to the Owner right to deduct the advance payments stated in Clause 8.1 and Clause 8.4 above.

[37] Clause 3.4 reads as follow:

The unit rate of dredging works shall be based on the commercial price of diesel fuel not exceeding RM2.00 per litre. Should the price of diesel escalating over RM2.00 per litre, the Owner shall absorb the price difference.

[38] Under cl 8.1, the respondent was to pay the appellant the full sum of RM1m at two different points in time. As this sum was duly advanced, the problem really was over its repayment by the appellant, whether it was to be repaid in one single payment or over 15 instalments.

[39] SP2 had testified that the repayments is to be over 15 instalments. This is picked up by the learned trial judge at para 12 of the judgment. The evidence however, shows that the respondent had made deductions for the full amount — see pp 459–460. At the material time, the appellant had submitted progress claims totaling RM1,614,394.10. After deducting 10% for the retention sum as required under cl 8.3, the respondent was liable to pay the appellant half the due sum of RM1,452,954.69, which is a sum of RM726,477.35. Because the respondent claimed that it had paid the appellant a total of RM1,851,412.30 comprising advance of RM1m and various payments for diesel fuel and rentals, the respondent claimed that it had in fact overpaid the appellant by RM1,124,934.95.

[40] We agree with the submissions of the appellant that the respondent was only entitled to deduct payments for the diesel fuel, workers' wages, and two instalment payments of RM66,666,66. The appellant's calculations at p 454 of the appeal records, that as at end of April 2007, the amount due from the respondent is the sum of RM692,997.32 is therefore correct and in accordance with the terms of the contract, in particular, cll 8.3 and 8.4. Furthermore, the appellant's calculations are borne out and confirmed by the testimony of the respondent's own witness, SP2 that on the matter of the repayments for the

advance, the repayments were to be recouped periodically over the duration of the contract and not in one single repayment, as was done by the respondent.

[41] We also agree with the submissions of the appellant that apart from the monthly progress claims, the respondent was obliged to make what we shall term as 'third party payments', that is, pay for the diesel fuel, pay for the wages of the personnel and crews, and pay the sand discharging subcontractors for their work. Where the respondent has made these payments, it is entitled to deduct such payments from the appellant's monthly progress claims.

[42] The obligation to pay monthly progress claims and such other payments as agreed is an important and significant term of the contract. It is a fundamental term of the contract where the defendant is entitled to treat himself as discharged from his obligations under the contract as pronounced in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675.

[43] In the Federal Court's decision in *Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83, it was opined that the '... deliberate refusal to pay what was already due by way of fortnightly payments was an important element on the question of their repudiation of the contract'. This is precisely what happened here. The respondent was obliged to pay the appellant and the evidence clearly showed that the respondent did not pay the appellant. The respondent's failure to pay what was already due is an important element on the question of repudiation of this contract. The failure to make timely payments can and did have serious and disastrous effect on the performance of the contract by the subcontractors and consequently, the appellant. We agree with the submissions of the appellant that this failure was a breach of the contract by the respondent which entitled the appellant to terminate the contract. Unfortunately, this was not properly appreciated by the learned trial judge rendering it thereby necessary in the circumstances for this court to intervene to put right what is plainly wrong.

[44] With this, we do not find it necessary to deal with the other reasons that were relied on by the appellant to terminate the contract save to say that we find no merit in the argument that the respondent was in breach in relation to the sand permits or licences. The appellant's concerns are without basis and is not supported by any evidence. We find it necessary to draw this conclusion and agree with the learned trial judge in this respect as it impacts on one of claims for idling costs in the appellant's counterclaim.

[45] On the matter of counterclaim, we first find that the respondent's defence is essentially one of denial. Sometime during the course of the trial, the respondent had indicated that it was contemplating an amendment to the reply

and defence to the counterclaim. It appears that this was not followed through. The pleadings are as found in the present appeal records.

[46] We find that the appellant had led sufficient evidence to prove that the appellant is first and foremost entitled to its claims for progress claims for work done to date. However, there must be deductions for the full advance, diesel fuel and for back charges:

Total work done	RM2,647,104.00
Deductions	RM1,830,882.70
Amount due	RM816,221.00

[47] Further, we are satisfied that the appellant has adduced sufficient evidence to prove on a balance of probabilities that as a result of the respondent's non-payment of the appellant's progress claims and those other payments as identified, the respondent is liable for idling costs up to the date of termination. However, we have chosen to make a distinction on these costs.

[48] The appellant has shown from the relevant correspondence and from the examination of the respondent's witness (SP1) that the respondent was responsible for the diesel supply and diesel payments; that the respondent was advised at the material time of a shortage; and that the respondent did not attend to the shortage. The respondent's failure in these several respects caused the stoppage of works and idling costs were thereby incurred. The appellant is entitled to idling costs due to a two-day diesel shortage at RM23,570 per day, that is, a sum of RM47,140.

[49] As for the other items of idling costs which the appellant has claimed for a period of one month, the appellant is not entitled to the full period as it is under a duty to mitigate towards reducing such costs. The appellant is further not entitled to idling costs which were by reason of the dispute over the sand boundaries, permits and licences for the reasons already discussed. For all these reasons, we believe that the appellant is only entitled to a third of the remaining idling costs claimed, that is one-third of RM1,412,340, a sum of RM470,780.

[50] The appellant is not entitled to its claim for compensation under cl 3.3 as the conditions for its invocation are not met. Neither is the appellant entitled to its costs of survey under cl 7.1 of the contract for want of proof.

CONCLUSION

[51] For all the reasons adumbrated above, the appellant's appeal is allowed; the respondent's claim in the court below is consequently dismissed and the appellant's counterclaim is allowed to the sum of RM1,334,141 (RM816,221

+ RM47,140 + RM470,780) together with interest at the rate of 5%pa from the date of this decision to the date of realisation.

[52] We further order the respondent to pay costs of this appeal.

Appeal allowed, respondent's claim in the court below dismissed and appellant's counterclaim in the sum of RM1,334,141 allowed.

Reported by Ashok Kumar